KAY HIAN PTE LTD

v.

MA BOON LAN

COURT OF APPEAL, PUTRAJAYA
AZAHAR MOHAMED JCA
BALIA YUSOF WAHI JCA
LIM YEE LAN JCA
[CIVIL APPEAL NO: Q-03(IM)-103-2011]
20 MAY 2013

BANKRUPTCY: *Notice - Setting aside - Conversion of judgment debt from Singapore currency to Malaysian Ringgit - Failure of - Whether rendered bankruptcy notice ('BN') a nullity - Whether conversion should be based on exchange rate prevailing at date of judgment - Whether judgment creditor's failure to obtain leave of court to commence execution proceedings following change of name rendered BN bad - Whether there was an abuse of process of court - Rules of the High Court 1980, O. 46 r. 2(1)(b)*

The appellant ('JC') had obtained judgment against the respondent ('JD') for $21,993.41 in Singapore currency. The judgment was taken under the JC's old name, *ie*, Kay Hian Pte Ltd although it had changed its name to UOB Kay Hian Pte Ltd ('new name') prior to the judgment. The JC filed execution proceedings against the JD using its new name, without having applied for leave of court to do so. It also claimed, in those proceedings, for the equivalent amount of the judgment debt in Malaysian Ringgit without stating how the amount was obtained. The JD applied to set aside the execution proceedings on the grounds that (i) the JC could not commence the execution proceedings without having obtained the leave of court under O. 46 r. 2(1)(b) of the Rules of the High Court 1980 ('RHC') in view of its change of name; and (ii) the amount claimed in Malaysian Ringgit was unacceptable as the JC had not explained how the converted sum was obtained. The JC's application was allowed by the High Court and that decision was confirmed, on appeal, by the Court of Appeal. Following that decision, the JC filed a bankruptcy notice ('BN') against the JD claiming for the sum of S$94,980.06 or its equivalent of RM227,606.18 as at the date of filing of the BN. The JC thereafter filed a creditor's petition ('CP') against the JD.

A The JD applied to strike out the BN and set aside the CP relying on the same grounds it had raised in its application to set aside the execution proceedings earlier. The High Court allowed both applications. In the instant appeal against that decision, the JC only appealed against the order setting aside the BN. *Inter alia*, B the JD submitted that based on case-law, the exchange rate to be used for conversion of the judgment debt should be the one at the date of the judgment, but what the JC had done was to use the exchange rate as at the date of filing of the BN, and this rendered the BN invalid.

C

Held (dismissing appeal; affirming decision of the High Court)

Per Lim Yee Lan JCA delivering the judgment of the court:

D **(1)** The CP was set aside for non-compliance with O. 46 r. 2(1)(b) of the RHC and there was no appeal against that order. Since the JC was not able to show it was in a position to issue execution on the judgment when it issued the BN, the BN was invalid and had to be set aside. (para 50)

E **(2)** The JC failed to quantify the exact amount owing in the BN as the wrong exchange rate was applied which rendered the BN invalid, void *ab initio* and a nullity. The JD must know the exact amount due at the date of the BN and he was not required to make calculations or enquiries on what was the F actual exchange rate from Singapore Dollars to Malaysian Ringgit as at the date of the judgment. (para 95)

(3) The issues raised in the application to set aside the BN were already determined by the Court of Appeal in the appeal G concerning the application for execution proceedings and the principles established therein equally applied to a bankruptcy proceeding. The High Court was therefore correct in holding itself bound by the Court of Appeal's decision. The JC's persistent and dogged attempt to ignore the appellate court's H decision and in insisting on issuing the bankruptcy proceedings based on the same terms and details which had been ruled against the JC was tantamount to an abuse of process of court. (paras 84, 85, 86 & 88)

I **(4)** The JC's argument that the JD was going behind the judgment to attack the judgment debt was without merit because the JD was not challenging the correctness of the

amount claimed in the BN by way of a r. 95 affidavit under the Bankruptcy Rules 1969 ('Rules') on the ground he had a counterclaim, set-off or cross-demand. Instead, his application was made under r. 18 of those Rules to challenge the JC's capacity to issue the BN in view of O. 46 r. 2(1)(b) of the RHC as well as the wrong mode employed to convert the sum claimed into Malaysian Ringgit. Those issues certainly fell within the 'other issues' ground under the r. 18 method of impugning a BN. (para 93)

Bahasa Malaysia *Translation Of Headnotes*

Perayu ('JC') telah memperolehi penghakiman terhadap responden ('JD') bagi jumlah $21,993.41 dalam mata wang Singapura. Penghakiman diambil atas nama lama JC, iaitu, Kay Hian Pte Ltd walaupun ia telah menukar namanya kepada UOB Kay Hian Pte Ltd ('nama baru') sebelum penghakiman itu. JC telah memfailkan prosiding pelaksanaan terhadap JD dengan menggunakan nama barunya, tanpa mendapat kebenaran mahkamah untuk berbuat sedemikian. Ia juga mentuntut, dalam prosiding tersebut, bagi jumlah yang setara dengan hutang penghakiman dalam Ringgit Malaysia tanpa menyatakan bagaimana jumlah itu diperolehi. JD telah membuat permohonan untuk mengenepikan prosiding pelaksanaan atas alasan-alasan bahawa (i) JC tidak dapat memulakan prosiding pelaksanaan tanpa memperolehi kebenaran mahkamah di bawah A. 46 k. 2(1)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') disebabkan penukaran namanya; dan (ii) jumlah yang dituntut dalam Ringgit Malaysia tidak boleh diterima memandangkan JC tidak memberi keterangan bagaimana jumlah yang ditukar itu diperolehi. Permohonan JC dibenarkan oleh Mahkamah Tinggi dan keputusan tersebut disahkan, atas rayuan, oleh Mahkamah Rayuan. Berikutan keputusan tersebut, JC telah memfailkan notis kebankrapan ('BN') terhadap JD dengan menuntut untuk jumlah S$94,980.06 atau setara dengannya bagi jumlah RM227,606.18 setakat tarikh pemfailan BN. JC kemudiannya telah memfailkan petisyen pemiutang ('CP') terhadap JD. JD telah memohon untuk membatalkan BN dan mengenepikan CP berdasarkan alasan sama yang telah dibangkitkan dalam permohonannya untuk mengenepikan prosiding pelaksanaan. Mahkamah Tinggi telah membenarkan kedua-dua permohonan itu. Dalam rayuan di sini terhadap keputusan tersebut, JC hanya merayu terhadap perintah yang mengenepikan BN. Di antara lain, JD menghujah bahawa berdasarkan kes undang-undang, kadar pertukaran yang digunakan bagi penukaran hutang penghakiman

A sepatutnya merupakan pada tarikh penghakiman, tetapi apa yang dibuat oleh JC adalah untuk menggunakan kadar pertukaran setakat tarikh pemfailan BN, dan ini menyebabkan BN tidak sah.

Diputuskan (menolak rayuan; mengesahkan keputusan
B **Mahkamah Tinggi)**
Oleh Lim Yee Lan HMR menyampaikan penghakiman mahkamah:

(1) CP diketepikan disebabkan oleh ketidakpatuhan A. 46 k. 2(1)(b) KMT dan tiada rayuan dibuat terhadap perintah
C tersebut. Memandangkan JC tidak dapat menunjukkan bahawa ia berada dalam keadaan untuk mengeluarkan pelaksanaan atas penghakiman itu apabila ia mengeluarkan BN, maka BN adalah tidak sah dan terpaksa diketepikan.

D **(2)** JC gagal untuk menjumlahkan amaun sebenar yang dihutang dalam BN memandangkan kadar pertukaran salah dipakai yang menyebabkan BN tidak sahih, tidak sah *ab initio* dan terbatal. JD perlu mengetahui jumlah sebenar pada tarikh BN dan beliau tidak perlu membuat perkiraan atau pertanyaan berkenaan
E jumlah sebenar kadar pertukaran daripada Dolar Singapura kepada Ringgit Malaysia setakat tarikh penghakiman.

(3) Isu yang dibangkitkan dalam permohonan untuk mengenepikan BN telah pun diputuskan oleh Mahkamah Rayuan dalam
F rayuan berkenaan permohonan bagi prosiding pelaksanaan dan prinsip yang dibuktikan dalamnya terpakai setara dengan prosiding kebankrapan. Mahkamah Tinggi dengan itu betul dalam pendiriannya untuk terikat dengan keputusan Mahkamah Rayuan. Ketetapan berterusan JC dan percubaan gigihnya
G untuk mengabaikan keputusan mahkamah rayuan dan dalam penegasannya untuk mengeluarkan prosiding kebankrapan berdasarkan terma-terma dan butir-butir sama yang telah diputuskan terhadap JC adalah sama seperti suatu penyalahgunaan proses mahkamah.

H **(4)** Hujahan JC bahawa JD menjengah di belakang penghakiman untuk mencabar hutang penghakiman adalah tanpa merit kerana JD tidak mencabar ketetapan jumlah yang dituntut dalam BN melalui k. 95 afidavit di bawah Kaedah-Kaedah
I Kebankrapan 1969 ('Kaedah') atas alasan bahawa beliau mempunyai tuntutan balas, set-off atau tuntutan silang. Malah, permohonan beliau dibuat di bawah k. 18 Kaedah tersebut untuk mencabar kapasiti JC untuk mengeluarkan BN berikutan

A. 46 k. 2(1)(b) KMT dan juga cara yang digunakan untuk menukar jumlah yang dituntut ke dalam Ringgit Malaysia. Isu-isu tersebut terangkum dalam "isu-isu lain" di bawah k. 18 untuk mempertikaikan BN.

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 ***(refd)***

Banfoong Sydney (JM) Sdn Bhd v. MIFC Credit & Leasing Sdn Bhd [1990] 1 CLJ 462; [1990] 1 CLJ (Rep) 622 HC ***(refd)***

Datuk Lim Kheng Kim v. Malayan Banking Bhd [1993] 3 CLJ 324 SC ***(refd)***

Fawziah Holdings Sdn Bhd v. Metramac Corporation Sdn Bhd & Another Appeal [2006] 1 CLJ 996 CA ***(refd)***

Ghazali Mat Noor v. Southern Bank Bhd & Other Cases [1989] 2 CLJ 380; [1989] 1 CLJ (Rep) 35 SC ***(refd)***

Malayan Banking Berhad v. Datuk Lim Kheng Khim [1] [1992] 3 CLJ 1449; [1992] 2 CLJ (Rep) 826 HC ***(refd)***

Re Cheah Wee Liam, Ex p Robert Teng Lye Hock [1999] 4 CLJ 305 HC ***(refd)***

Re Hj Ahmad Lazim & Ors; ex p Bank Kerjasama Rakyat (M) Bhd [1999] 2 CLJ 101 HC ***(refd)***

Re Kang Chong Yeow, ex p Mivan Far East Sdn Bhd [2001] 8 CLJ 226 HC ***(refd)***

Re Khoo Chee Tong, ex parte Unik (Malaysia) Sdn Bhd [1996] 2 BLJ 475 HC ***(refd)***

Re Liew Kong Ken ex p Sucorp Enterprise Sdn Bhd [1998] 2 CLJ Supp 508 HC ***(foll)***

Re Ling Ten Yew; ex parte: Bersama Diri Edar Sdn Bhd [2002] 1 LNS 134 HC ***(refd)***

See Hua Daily News Bhd v. Tan Thien Chin & Ors [1985] 1 LNS 131 ***(refd)***

Wong Li Fatt William (an infant) v. Haidawati Bolhen & Anor [1994] 1 LNS 196 HC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 3

Bankruptcy Rules 1969, rr. 18, 95

Rules of the High Court 1980, O. 14, O. 46 rr. 2(1)(b), (c), 3(2)(c), O. 47 r. 6(7)

For the appellant - Tai Choi Yu; M/s Tai Choi Yu & Co Advocs

For the respondent - Antonio Sim (Louis Achuk with him); M/s Kadir, Wong, Lin & Co Advocs

[Appeal from High Court, Miri; No: 29-333-2008(MR)]

Reported by Ashok Kumar

A

JUDGMENT

Lim Yee Lan JCA:

[1] The present appeal arose from the decision of the learned Judicial Commissioner ('JC') given in the High Court at Miri on 16 June 2011 in which he had dismissed the appellant/judgment creditor's appeal in encl. (25).

[2] Enclosure (25) was the appellant/judgment creditor's appeal to judge in chambers against the decision of the Senior Assistant Registrar ('SAR') in allowing the respondent/judgment debtor's application in encl. (6) to set aside the appellant/judgment creditor's bankruptcy notice dated 17 October 2008 issued against the respondent/judgment debtor in encl. (4).

[3] We heard the appeal on 30 November 2012 and after hearing oral arguments, we reserved judgment. We now give our judgment.

[4] The appellant/judgment creditor was the plaintiff and the respondent/judgment debtor was the defendant in the High Court Suit No: Suit MR83-1987 from which the bankruptcy notice emanates.

[5] For convenience parties will be referred to in this judgment as they were known in the court below.

[6] Before we proceed further, it is pertinent for us to set out the factual background and the sequence of events leading to this appeal.

Relationship Between Plaintiff And Defendant

[7] The plaintiff was a firm of stockbrokers in Singapore and the defendant was a businessman. The plaintiff had pursuant to an agreement dated 15 October 1984 (the said agreement), granted to the defendant certain credit and trading facilities relating to transactions and/or trading and/or sale and purchase of public listed shares on the Singapore stock exchange. The plaintiff terminated the facilities allegedly upon breach by the defendant of the said agreement.

[8] *Vide* the present suit (Suit No: MR83-1987) the plaintiff claimed a sum of S$21,993.41 from the defendant as at first October 1985 with interest thereon at the rate of 1.2% *per mensem* from 1 October 1985 until full payment, alleged to be owing by the defendant to the plaintiff under the said agreement. A

[9] The defendant disputed the plaintiff's claim and counterclaimed for the return of shares he had pledged with the plaintiff as security for margin facilities and in the alternative, damages for the conversion of the said shares. B

[10] The plaintiff's claim was dismissed by the High Court but on appeal to the Court of Appeal *vide* Civil Appeal No: Q-02-425-2001 the plaintiff's claim was allowed on 8 August 2003 and judgment was ordered to be entered for the plaintiff as prayed and the defendant's counterclaim was dismissed with costs ("judgment order dated 8 August 2003"). C D

[11] The defendant applied to the Federal Court for leave to appeal but it was refused by the Federal Court on 9 March 2004.

[12] The plaintiff then through letter of its solicitors demanded from the defendant a sum "of RM49,406.67 together with interest of RM134,219.88 from 1 October 1985 to 12 August 2004" representing the judgment debt. E

[13] The defendant did not respond to the plaintiff's demand for payment. F

Execution Proceedings Commenced Against Defendant

[14] The plaintiff then took out execution proceedings in application for execution No: 36-4-2004(MR) and obtained a prohibitory order for five pieces of land in which the respondent/judgment debtor was the registered proprietor/co-proprietor and applied for summons for directions dated 6 January 2005 for the sale of the said lands which was fixed for hearing on 15 March 2005. G H

[15] The defendant then filed an application in summons in chambers dated 11 March 2005 to strike out the summons for directions.

[16] The summons for directions was supposed to be heard before the SAR on 15 March 2005 but was adjourned to 18 May 2005. I

[17] Since the prohibitory order was valid only for six months the plaintiff then applied for a new execution proceedings No. 36-1-2005(MR) under application for execution dated 18 May 2005 for a new prohibitory order under O. 47 r. 6(7) RHC against the said five pieces of land and the SAR gave an order in terms of the application.

[18] The defendant then filed an application in summons in chambers dated 8 July 2005 in encl. (21) to set aside the summons for direction dated 13 June 2005; the writ of execution dated 18 May 2005 and the prohibitory order dated 19 May 2005; and for the execution proceedings No. 36-1-2005 (MR) to be dismissed and set aside.

[19] The defendant's application in encl. (21) was heard before the SAR on 30 August 2005 and on 26 September 2005 the SAR dismissed the defendant's application in the said encl. (21).

[20] The defendant then appealed to the judge in chambers in encl. (35) against the decision of the SAR in dismissing its application in encl. (21).

[21] It would appear that there were five agreed issues for determination by the learned judge during the hearing of the encl. (35) appeal as follows:

(a) Whether obtaining the leave under O. 46 r. 2(1)(b) of the RHC 1980 due to the change of name is a condition precedent for the application of the issuance of the writ of execution under O. 46 r. 2(1)(b) of the RHC 1980?

(b) Whether the Court of Appeal order dated 8th day of August 2003 is interlocutory or final?

(c) Whether the learned Deputy Registrar is empowered to grant a new PO after the lapse of the first PO on the same parcels of lands and upon the same cause of action under O. 47 r. 6(7) of the RHC 1980?

(d) Whether the learned Deputy Registrar has the power to set aside the summons for directions?

(e) Whether the JC is entitled to attach the five parcels of lands in the schedule in which the JD is not beneficially interested to the said land.

[22] The learned High Court Judge in a detailed judgment handed out on 12 December 2005 ("encl. (35) judgment") made specific findings on the five agreed issues. In particular, the learned judge's findings on the first and second issues in encl. (35) are as follows:

> ...
>
> The Plaintiff/Judgment Creditor then took out Execution Proceedings in Application for Execution No. 36-4-2004(MR) and obtained Prohibitory Order against five (5) parcels of land in which the Defendant/Judgment Debtor was the registered proprietor/co-proprietor and applied by Summons for Directions dated 06/01/2005 for the sale of the said lands which was fixed for hearing before the learned Deputy Registrar on the 15/03/2005.
>
> ...
>
> The Defendant/Judgment Debtor then filed his Summons In Chambers (Encl 21) dated the 05/07/2005 to set aside the Plaintiff/Judgment Creditors' Summons for Directions dated 13/06/2005 (Encl. 13); the Writ of Execution dated the 19/05/2005 and the Prohibitory Order dated 19/05/2005 and further that the Execution Proceedings No.36-1-2005(MR) be dismissed and set aside. The grounds for the application are:
>
> (i) that the name of the Judgment Creditor (JC) has been changed since 2001 from Kay Hian Pte Ltd to UOB Kay Hian Pte Ltd, and the JC is required to apply for leave to issue the Writ of Execution under Order 46 Rule 2(1)(b) of the RHC. No such application was made by the JC.
>
> (ii) ...
>
> (iii) ...
>
> (iv) that the sum of RM 179,176.55 unilaterally assessed by the JC without the leave of the Execution Debtor (JD) is wrong in law and in fact;
>
> (v) ...
>
> The Defendant/Judgment Debtor's Summons In Chambers [Encl. 21] was heard before the learned Deputy Registrar on the 30/08/2005 with written submission by both parties and on the 26/09/2005 the learned Deputy Registrar dismissed the Defendant/Judgment Debtor's said application with costs to be taxed unless agreed.

A It is from the aforesaid decision of the learned Deputy Registrar that the Defendant/Judgment Debtor now appeals to the Judge in Chambers and the issues as stated are as follows:

(a) Whether obtaining the leave under Order 46 Rule 2(l)(b) of the RHC 1980 due to the change of name is a condition precedent for the application of the issuance of the Writ of Execution under Order 46 Rule 4 of the RHC 1980?

B

(b) Whether the Court of Appeal order dated 8th day of August, 2003 is interlocutory or final?

C (c) ...

(d) ...

(e) ...

D As to the first issue, O. 46 r. 2(1)(b) reads:

(l) A writ of execution to enforce a judgment or order may not issue without the leave of the Court in the following cases, that is to say:

E (a) ...

(b) Where any change has taken place, whether by death or otherwise in the parties entitled or liable to execution under the judgment or order:

F (c) ...

(d) ...

(e) ...

G Learned counsel for the defendant submits that the word "otherwise" in the said rule means in any other way besides death. He cited the case of In re *Liew Kong Ken Ex P Sucorp Enterprise Sdn Bhd* [1998] 2 CLJ (Supp) 508 where it was held at p. 509:

H

> The word "otherwise" following the word "death" in O. 46 r. 2(1)(b) of the RHC should be interpreted to mean "in any other way". Even if the word "otherwise" is to receive an *ejusdem generic* interpretation, it will not help the cause of the petitioning creditor because since "death" connotes cessation, a change in name is definitely a cessation in the use of a former name. Hence, a change of name is within the ambit of the word "otherwise" in O. 46 r. 2(1)(b) of the RHC.

I

In this instant case it is not disputed that the Plaintiff has changed its name from Kay Hian Pte. Ltd. The name under which the Plaintiff has commenced the Original Proceedings against the Defendant in the High Court and the Court of Appeal to UOB Kay Hian Pte. Ltd. The new name under which the Plaintiff has commenced this execution proceedings against the Defendant. It is also not disputed that the Plaintiff has not applied to substitute the Plaintiff Original name for the new name. Therefore learned counsel for Defendant submits that at the time of applying for Writ of execution the Original Plaintiff already ceased to exist.

On this ground alone that is for want of leave by the judgment creditor to commence execution proceeding against the defendant /judgment debtor I would allow the appeal by the debtor/judgment debtor. In fact this is the only ground on which I decided to allow the defendant/judgment creditor's appeal.

...

Secondly, the defendant/judgment debtor contends that the Order obtained by the plaintiff/judgment creditor from the Court of Appeal against the defendant/judgment debtor which the plaintiff/ judgment creditor now seeks to enforce or execute is not a final order but an interlocutory. The defendant says the order is interlocutory because the plaintiff in paragraph 6(1) of its statement of claim had claimed against the defendant a liquidated sum of Singapore $21,993.41. There is no Malaysian Ringgit equivalent stated for the said sum in the statement of claim.

...

In this respect, learned counsel for the defendant submits that the sum of RM179,176.55 in local currency in the writ of execution as the equivalent of the judgment amount S$21,993.41 is wrong and unacceptable as it is the plaintiff's own conversion from Singapore Dollars to Malaysian Ringgit of the said judgment sum. It was argued that the unilateral conversion into Malaysian Ringgit was wrong and unacceptable because the conversion rate used by the plaintiff to do the conversion could be challenged by the defendant. This is because the conversion is subject fluctuation and could be different at different times.

While I agree that the unilateral conversion by the Plaintiff is unacceptable, I cannot agree that the Court of Appeal Order is interlocutory and not a final order. In so far as the defendant being liable to the plaintiff for the sum of S$21,993.41, it is my opinion final. However, before the Plaintiff could execute the Judgment to recover the Judgment amount the Plaintiff and the Defendant would be required to settle or agree on the rate of

A conversion to be used and this can be done by stating the conversion rate used in the Affidavit supporting the application for the Writ of Execution so that the issue can be deliberated when the application comes up for hearing. In this instant the Plaintiff had not stated the rate of conversion it had used to do the
B conversion. Thus I agree that the unilateral conversion is unacceptable and wrongful.

[23] Dissatisfied with the encl. (35) judgment the plaintiff then appealed to the Court of Appeal *vide* Civil Appeal No. Q-03-1-2006 and in an unreported judgment dated 28 July 2008 the
C Court of Appeal upheld the High Court's judgment and dismissed the plaintiff's appeal.

[24] In particular, the Court of Appeal upheld the findings of the learned judge that leave of court was required under the O. 46
D r. 2(1)(b) RHC before the plaintiff could issue execution and the unilateral conversion of judgment in the following manner:

JUDGMENT

Facts

E

The facts of this case are succinctly set out by the learned trial Judge in his grounds of judgment. There is no necessity for us to repeat them here. We shall proceed straight to the salient points raised in this appeal.

F …

2nd Question

Is leave of Court required to issue a writ of execution when the respondent's name has changed to UOB Kay Hian Ltd from Kay
G Hian Pte Ltd-at the time when the application for a writ of execution was made?

Answer

Our answer to this question is in the positive.

H

1. Order 46 rule2 (i) (b) RHC requires:

"A writ of execution to enforce a judgment or order may not issue without the leave of the Court in the following cases, that is to say where any change has taken pace,
I whether by death or **otherwise**, in the parties entitled or liable to execution under the judgment or order".
(emphasis added).

2. We are of the view that the word "otherwise" in this rule includes a change of name of a party.

3. Therefore, as a condition precedent, the appellant should have applied to the Court for leave when requesting for the issuance of a writ of execution since by that time its name has been changed from "Kay Hian Pte Ltd" (appearing in the judgment order) to UOB Kay Hian Pte Ltd".

4. We are aware that s. 23(6) of the Companies Act says:

> A change of name pursuant to this Act shall not affect the identity of the company or any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced by or against it by its former name may be continued or commenced by or against it by its new name".

But we are of the view that, procedurally, this does not mean that leave of the Court under Order 46 rule 2(1)(b) RHC is waived. The identity or the rights and obligations of the company that has changed its name remains but for the purpose of execution the company with a new name must have the leave of the Court before a writ of execution can be issued. This is for good measures since execution requires specific identities of parties to avoid mistaken execution.

3rd Question

Can the appellant unilaterally convert a sum of S$21,993.41 appearing in the judgment order into RM197,162.08 and listed this as the amount due in the writ of execution and Prohibitory Order?

Answer

The answer to this Question is in the negative.

1. The judgment sum due by the respondent to the appellant under the judgment order was in Singapore dollar amounting to S$21,993.41.

2. The appellant had taken the liberty to unilaterally convert this to Malaysian currency using an exchange rate of S$1.00 to RM2.3433.

3. We agree with the trial judge that this approach by the appellant is unacceptable when there is no affidavit filed by the appellant to explain how and when this rate of exchange

was perceived. This is of particular importance since the exchange rate of a floated currency fluctuates from time to time.

4. For this reason we hold the view that the writ of execution is defective and cannot be cured since when such non compliance has occasioned a substantial miscarriage of injustice.

Conclusion

Accordingly, we unanimously dismissed this appeal with costs. Deposit for this appeal to the respondent towards account of taxed costs. The order of the High Court dated 12.12.2005 affirmed.

[25] The plaintiff then applied to the Federal Court for leave to appeal against the Court of Appeal's decision but it was refused.

Bankruptcy Notice And Creditor's Petition

[26] What happened after that was that the plaintiff then filed Bankruptcy Proceedings No. 29-333-2008 and served on the defendant the present bankruptcy notice dated 17 October 2008 in encl. (4) ('the bankruptcy notice').

[27] The defendant then filed an application *vide* summons in chambers in encl. (6), among others, to strike out the bankruptcy notice.

[28] The defendant's application in encl. (6), which was supported by his affidavit in support, cited the following three grounds for setting aside the bankruptcy notice:

(a) That the name of the plaintiff has been changed since 2001 from Kay Hin Pte Ltd to UOB Kay Hin Pte Ltd, and the plaintiff was required to apply for leave of the court to issue the writ of execution under O. 46 r. 2(1)(b) of the RHC. However no such application was made;

(b) That the sum of Singapore Dollars $94,980.06 or RM227,606.18 (based on the rate of Bank Negara for commercial bank on 1 October 2008 as per buying rate at RM1.00:S$0.4173) is unilaterally assessed by the plaintiff without the consent of the defendant is wrong in law and in fact; and

(c) That the plaintiff's claim is an unjust enrichment in that the sum of S$21,955.23 claimed by the plaintiff has been fully settled in 1988.

[29] It is noted that the first issue and the second issue (*albeit* worded differently) raised and decided upon in the encl. (35) judgment coincided with the issues raised in the first and second grounds in encl. (6) for striking out the bankruptcy notice.

[30] Encl. 6 was heard before the SAR on 11 November 2008 who on 14 April 2009 allowed encl. (6) and struck out the bankruptcy notice based on the second ground (see decision of SAR on pp. 39-41 ROA).

[31] Dissatisfied with the decision of the SAR in allowing encl. (6) and striking out the bankruptcy notice, the plaintiff *vide* a notice of appeal dated 16 April 2009 in encl. (25) appealed to the judge in chambers against the decision of the SAR.

[32] Pending the hearing of the defendant's application in encl. (6) to set aside the bankruptcy notice, the plaintiff as the creditor in bankruptcy proceedings No. 29-333-2008 had on 16 January 2009 filed a creditor's petition against the defendant ("creditor's petition") in encl. (20).

[33] Even though the bankruptcy notice had been set aside and despite the plaintiff's appeal to the judge in encl. (25) was still pending, the plaintiff had on 17 June 2009 proceeded to file an *ex parte* application for substituted service of the creditor's petition which was granted by the SAR on 19 June 2009 and on 6 July 2009 the plaintiff proceeded to serve the creditor's petition by substituted service *vide* two publications in the "Borneo Post" and the "United Daily News" respectively.

[34] On 4 September 2009 the defendant *vide* a summons in chambers in encl. (18) applied to set aside the creditor's petition and the notice of substituted service. The defendant also served a notice of intention to oppose the petition on the plaintiff.

[35] On 7 June 2009 the SAR dismissed the defendant's application to strike out the creditor's petition and the notice of substituted service.

[36] The defendant then filed an appeal in encl. (42) to the judge in chambers against the dismissal of its application to set aside the creditor's petition and the notice of substituted service which was allowed by the SAR on 7 December 2009.

[37] Enclosures (25) and (42) came up for hearing (together with two other appeals between the parties) and the learned JC upon hearing the parties in a judgment handed out on 16 June 2011, *inter alia*, dismissed the plaintiff's appeal in encl. (25) and set aside the bankruptcy notice and allowed the defendant's appeal in encl. (42) and set aside the creditor's petition.

[38] The relevant parts of the learned JC's judgment (at pp. 10 to 18 of the ROA) in so far as they relate to his findings on the first two grounds in encl. (6) read as follows:

> 6. There are several applications or proceedings before the court as follows:
>
> ...
>
> (2) Bankruptcy Proceeding No. 29-333-2008
>
> The Plaintiff had issued a bankruptcy notice dated 17.10.2008 against the Defendant. By a summons in chambers dated 11.11.2000 (Encl 6), the Defendant applied that the bankruptcy notice be struck out. The application was heard before the SAR who allowed the Defendant's application. The Plaintiff appealed against the decision of the SAR on 16.4.2009 under O. 56 RHC to the Judge in Chambers (Encl 25).
>
> (3) Application for Execution No. 36-04-2010
>
> By a praecipe for writ of execution dated 28.7.2010 and writ of seizure and sale dated 29.7.2010, the Plaintiff issued a prohibitory order dated 29.7.2010 against the said five parcels of land belonging to the Defendant in satisfaction of the judgment. By a summons for directions dated 19.11.2010 (Encl 15) the Plaintiff sought an order to sell the 5 parcels of land subject to the directions of the court. By a summons in chambers dated 16.12.2010 (Encl 18), the Defendant applied that the Plaintiff's Application for Execution No. 36-04-2010 including the summons for directions, the praecipe for writ of execution, the writ of seizure and sale and the prohibitory order together with any renewals thereto be dismissed or be set aside and till at the prohibitory order which had been registered against the 5 parcels of land be removed from the relevant land registries.

...

(7) All the applications or proceedings were heard together. I shall deal with Application for Execution No. 36-04-2010 and Bankruptcy Proceedings No. 29-333-2008 first. The grounds in both applications were similar:

(a) that the Plaintiff had since 2001 changed its name from Kay Hian Pte Ltd to UOB Kay Hian Pte and the Plaintiff did not apply for leave under O. 46 r. 2(1)(b) RHC before filling both the Application for Execution No. 36-04-2010 and Bankruptcy Proceedings No. 29-333-2008;

(b) that the Plaintiff had unilaterally converted the judgment given in exchange rate which was without the consent or not agreed to by the Defendant; and

(c) ...

(8) The above issues had been decided in the appeal brought by the Plaintiff to the Court of Appeal against the decision of the then presiding High Court Judge in Civil Appeal No. Q-03-1-2006. In a decision handed down on 28.7.2008 (unreported), it was decided as follows:

(a) ...

(b) That under O. 46 r. 2(1)(b) RHC, which provides that a writ of execution to enforce a judgment or order may not issue without the leave of the court in the following cases, that is to say where any change has taken place, whether by death or otherwise, in the parties entitled or liable to execution under the judgment or order, it was a condition precedent that the Plaintiff was to apply for leave of the court when requesting for the issuance of a writ of execution where a party in the proceedings had changed its name.

(c) The Plaintiff could not unilaterally convert a sum of S$21,993.41 appearing in the judgment order into RM197,162.08 and listed this as the amount due in the writ of execution and prohibitory order.

(9) The Plaintiff submitted that it had changed its name in 2001. As there has been no change in the name of the Plaintiff since the date of the Judgment in 2003, there was no necessity to apply for leave of the court. This was not correct because the Plaintiff's name in Suit 83-1987, Civil Appeal Q-02-425-2001 and the judgment was intituled as Kay Hian Pte Ltd but is now intituled as Kay Hian Pte Ltd (now known as UOB Kay Hian Pte Ltd) and UOB Kay Hian Pte Ltd in these proceedings.

A

10. ...

11. Following the decision of the Court of Appeal which is binding on this court, I make the following order; (a) the Plaintiff's appeal in Encl. 25 in Bankruptcy Proceedings No. 29-333-2008 is dismissed with costs to be taxed if not
B agreed (b) the Defendant's application in Encl 18 Application for Execution No 36-04-2010 is allowed with costs to be taxed if not agreed.

[39] The present appeal before us is concerned only with the
C learned JC's decision on encl. (25), ie, plaintiff's appeal against the setting aside of the bankruptcy notice. This is clear from the plaintiff's notice of appeal dated 14 July 2011 (see pp. 22-23 ROA).

[40] However, in its memorandum of appeal ('MOA') the plaintiff
D cited the following general grounds of appeal against the striking out of its bankruptcy notice:

(a) That the learned JC erred in law and/or misdirected himself in allowing the defendant's application in encl. 6 to set aside the
E plaintiff's bankruptcy notice dated 17 October 2008 in encl. 4 and/or in dismissing the appellant/judgment dismissing the appellant/judgment creditor's appeal dated 16 April 2009 in encl. 25;

F (b) That the learned JC erred in law and misdirected himself in allowing the defendant's application in encl. 42 to set aside the plaintiff's creditor's petition dated 16 January 2009 and filed on 26 February 2009 in encl. 20 and/or in dismissing the plaintiff's appeal;

G (c) That the appellant/judgment creditor reserves its rights to file and serve further grounds of appeal upon receipt of the notes of proceedings and the grounds of decision from the JC.

[41] In a supplemental memorandum of appeal dated 28 March
H 2012 the plaintiff cited the following additional grounds of appeal:

(d) The learned JC in his appellate capacity erred in law and/or misdirected himself in that he failed or refused to give any reason for affirmation of the Senior Assistant Registrar's
I decision to strike out the bankruptcy notice issued to the defendant.

(e) It is trite and settled law that the appellant is entitled to file the bankruptcy notice because:

(i) the Court of Appeal had on the 8 August 2003 granted judgment to the appellant against the respondent for "judgment be entered against the defendant for S$21,993.41 or its equivalent in Malaysian Currency as at 1 October 1985 with interest thereon at the rate of 1.2% *per mensem* from 1 October 1985 to the date of full payment and costs"; and

(ii) the aforesaid judgment debt has not been satisfied and not one cent had been paid by the respondent. Hence the learned JC erred in law, misdirected himself and failed or refused to apply the correct principles of law in dismissing the plaintiff's appeal in the High Court.

[42] We observed a number of errors and/or inaccuracies in the MOA and supplemental MOA which we believe require correction before we proceed further.

[43] Firstly, there was no appeal on encl. (42) by the plaintiff. This is clear from the plaintiff's notice of appeal. Hence the present appeal before us is confined to the plaintiff's appeal on the setting aside of the bankruptcy notice.

[44] Secondly, the learned JC had given his written grounds of decision as to why he dismissed the plaintiff's appeal on encl. (6) and the said decision is found in pp. 10 to 18 of the ROA.

[45] Thirdly, judgment order dated 8 August 2003 did not state that "judgment be entered against the defendant for S$21,993.41 or its equivalent in Malaysian Currency as at 1 October 1985 with interest thereon at the rate of 1.2% *per mensem* from 1 October 1985 to the date of full payment and costs" as alleged by the plaintiff in its supplemental MOA. All that the order (which is found on pp. 83-84 of the ROA) stated was that "... AND IT IS ORDERED THAT the appellant's appeal be allowed and cross appeal dismissed with costs here and below and AND FURTHER ORDERED that judgment entered as prayed by the plaintiff ...". The prayers of the plaintiff as found in para. 6 of its statement of claim were for "(1) the said outstanding sum of S$21,993.41; (2) further interest thereon at the rate of 1.2% *per mensem* from the 1st day October 1985 to the date of full payment; and (3) costs."

[46] So what we have before us is the judgment order dated 3 March 2003 in which the plaintiff was granted judgment against the defendant for a sum of S$21,993.41 and further interest thereon at the rate of 1.2% *per mensem* from the 1st day October 1985 to the date of full payment.

[47] What then is the effect on the bankruptcy notice since plaintiff did not appeal against the setting aside of the creditor's petition? It would appear that it renders the bankruptcy notice a notice that is irregularly issued (see: *Re Liew Kong Ken ex p Sucorp Enterprise Sdn Bhd* [1998] 2 CLJ Supp 508 and *Re Hj Ahmad Lazim & Ors; ex p Bank Kerjasama Rakyat (M) Bhd* [1999] 2 CLJ 101; [1999] 5 MLJ 478).

[48] In *Re Liew Kong Ken*, apart from the passage quoted above in the encl. (35) judgment in relation to O. 46 r. 2(1)(c), Richard Malanjum J (now CJSS), *inter alia*, also held at p. 515 as follows:

> Accordingly if the plaintiff in the said judgment wishes to request for a bankruptcy notice it should in the first place be in the position to issue execution. For instance, if it has not obtained leave pursuant to O.46 r. 2(1)(a) since the said judgment has exceeded the six years period, it will not be in the position to request for an issuance of a bankruptcy notice. In this case however the Plaintiff did secure leave from the court. *And there would have been no other impediment if it was the Plaintiff in its own name as stated in the said judgment which requested for the issuance of a bankruptcy notice.* (emphasis added).

[49] We also refer to the case of *Re Hj Ahmad Lazim & Ors*, in which Clement Skinner JC (as he was then) held, *inter alia*, at p. 479 (MLJ) as follows:

> (3) If more than 6 years have elapsed since a judgment is obtained, and leave has not been obtained to execute that judgment, the judgment creditor cannot be described as being in a position to issue execution on that judgment. If execution can be issued only with leave of the court such leave must be obtained before a bankruptcy notice can be issued thereon. Since the respondent has not been able to show that they were in a position to issue execution on their judgment when they issued the present bankruptcy notice, the notice was therefore irregularly issued.
>
> (4) The irregularity in this case has resulted in the present bankruptcy notice being issued and served on the appellants when it should not have been issued in the first place. The sufferance of such an act is a matter of substantial injustice

to the appellants which cannot be remedied by any order of court short of an order invalidating the bankruptcy notice by setting it aside. In accordance with r. 98 of the Bankruptcy Rules 1969, it was held that no act of bankruptcy has been committed by the appellants under the present bankruptcy notice.

[50] It is clear that the plaintiff's creditor's petition had been set aside by the SAR and affirmed by the learned JC on its appeal *vide* encl. (42) and there was no appeal against the setting aside of its creditor's petition. Consequently, since the plaintiff has not been able to show that it was in a position to issue execution on the judgment dated 8 August 2003 when it issued the present bankruptcy notice as its creditor's petition has been set aside by the learned JC for non-compliance with O. 46 r. 2(1)(c), the bankruptcy notice is invalidated and has to be set aside.

[51] Hence, on this ground alone we would have dismissed the present appeal. However, for the sake of completeness of this judgment we will proceed to consider this appeal on its merits.

[52] It is pertinent at this juncture to set out the impugned bankruptcy notice, the subject-matter of the defendant's striking out application, which reads as follows:

BANKRUPTCY NOTICE

To: MA BOON LAN (BLUE I.C.K. 418478)
NOW REPLACED BY WN. KP. 370815-71-5487
No. 23, Merbau Road,
98000 Miri, Sarawak.

TAKE NOTICE that within seven (7) days, after service of this Notice on you, excluding the day of such service, you must pay to KAY HIAN PTE LTD (now known as UOB KAY HIAN PTE LTD) of 80 Raffles Place, #30-01 UOB Plaza 1, Singapore, the sum of SINGAPORE DOLLARS Ninety Four Thousand Nine Hundred Eighty & Cents Six Only (S$94,980.06) OR its equivalents in Malaysia Currency of RM227,606.18 (based on the exchange rate of Bank Negara for commercial bank on 17.10.2008 as per buying rate at RM1.00: S$4173) as particularized in the Schedule hereto, claimed by them as the sum due on the Court Order granted and dated the 8th day of August 2003 obtained by them against you in the Court of Appeal Malaysia *vide* Civil Appeal No. Q-02-425-2001 whereupon execution has not been stayed, or you must secure or compound for the said sum to their satisfaction or to the satisfaction of the Court; or you must satisfy the Court that you have a counterclaim, set-off or cross demand

against the said KAY HIAN PTE LTD (now known as UOB KAY HIAN PTE LTD) which equals or exceeds the amount claimed by the said KAY HIAN PTE LTD (now known as UOB KAY HIAN PTE LTD) and which you have not set up in the action in which the said Court Order was obtained.

SCHEDULE

Judgment sum:		S$21,993
Add : Interest on S$21,993.41 at the Rate of 1.2% *per mensem* from 01.10.1985 to the 17.10.2008 (276 months & 17 days)		
=	(S$21,993.4 1x 1.2%) x 276 months + (S$21,994.41 x ½%) x 17/31 days	
=	S$263.92 x 276 months + (S$263.92 x 17/31 days)	
=	S$72,841.92 + S$144.73	
=	S$72,986.65	S$72,986.65
		S$94,980.06

[Or its equivalent in Malaysian Currency RM227,606.18) (based on the exchange rate of the Bank Negara for Commercial bank on 17.10.2008 as per buying rate at RM1.00 = S$0.4173]

Dated this 17th day of October 2008.

By the Court

Signed
Senior Assistant Registrar
High Court, Miri.

[53] It is obvious that the bankruptcy notice was issued pursuant to s. 3 of the Bankruptcy Act 1967 which reads as follows:

3(1) A debtor commits an Act of bankruptcy in each of the following cases:

(a) … ;

(b) … ;

(c) … ;

(d) ... ;

(i) ... or

(ii) ...

(e) if execution issued against him has been levied by seizure of his property under process in an action or in any civil proceeding in the High Court, Sessions Court or Magistrates Court where the judgment, including costs, is for an amount of thirty thousand ringgit or more;

(f) ... ;

(g) ... ;

(h) ...

(i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:

Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

(j) ...

(2) A bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of noncompliance therewith and shall be served in the prescribed manner.

A Provided that a bankruptcy notice -

(i) ... ; and

(ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the
B amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as
C would have constituted compliance with the notice had the actual amount due been correctly specified therein.

Submissions Of Parties

D **[54]** Before us, learned counsel for the plaintiff, Mr Tai Choi Yu, in his written submission and oral argument, submits that the broad legal issue arising under this appeal is this: whether at the hearing of a bankruptcy notice the court can go behind the judgment which was regularly obtained after a full trial and where
E the Federal Court affirmed the judgment and where no allegation of fraud or collusion or miscarriage of justice was raised and further where the amount of judgment exceeded RM30,000 as set out therein alternatively in Singapore currency and in Ringgit Malaysia?

F **[55]** Learned counsel contends that the answer to the question is in the negative, for the following grounds.

(a) It is trite law that at the hearing of a bankruptcy proceedings the court cannot go behind the judgment that has been
G regularly obtained after a full trial and where no allegations of fraud or collusion or miscarriage of justice was raised during the trial to strike out the bankruptcy notice, reliance being placed on the case law authorities of *Banfoong Sydney (JM) Sdn Bhd v. MIFC Credit & Leasing Sdn Bhd* [1990] 1 CLJ 462;
H [1990] 1 CLJ (Rep) 622; [1990] 2 MLJ 120, *Malayan Banking Berhad v. Datuk Lim Kheng Khim [1]* [1992] 3 CLJ 1449; [1992] 2 CLJ (Rep) 826; [1992] 2 MLJ 540 and *Re Khoo Chee Tong; ex parte Unik (Malaysia) Sdn Bhd* [1996] 2 BLJ 475; [1996] 5 MLJ 39.

I

(b) For example *Re Khoo Chee Tong*, the court held, *inter alia*, that the court hearing an application to set aside the bankruptcy notice cannot go behind the judgment. The validity of the judgment debt will only be inquired into when there is evidence of fraud or collusion or miscarriage of justice. It was also held in *Datuk Lim Kheng Khim* that a bankruptcy court has the power to go behind a judgment on which the bankruptcy proceedings is founded if there is evidence of fraud, collusion or miscarriage of justice. The court held in that case that there was no allegation of fraud or collusion and the judgment sum proper was not challenged and remained a judgment debt and it would be a greater miscarriage of justice and the ends of justice would be defeated if the judgment could not be used in this case to found bankruptcy proceedings just because the interest after judgment awarded was more than it should be. However, in the interests of justice, the excess amount should be reduced later by the official assignee after the receiving and adjudication orders were made.

(c) Hence, both the SAR and the learned JC erred in law and in fact when they purported to go behind the judgment order dated 8 August 2003 which was regularly obtained after a full trial and where the Federal Court had affirmed the judgment and where there were no allegations of fraud or collusion or miscarriage of justice raised by the defendant and further where the amount stated in the bankruptcy notice exceeded RM30,000 as set out therein alternatively in Singapore currency and in Ringgit Malaysia.

(d) Secondly, the learned SAR had offered only one ground for striking out the bankruptcy notice dated 17 October 2008, ie, that the conversion of the judgment sum was not made as at the time of the cause of action accrued". In the case of the learned JC as the appellate judge he did not give any reason for the striking out of the bankruptcy notice and merely referred to the Court of Appeal's decision in Civil Appeal No. Q-03-1-2006 which was a decision of the Court of Appeal on the striking out of the prohibitory order.

(e) Thirdly, as the said Civil Appeal No. Q-03-1-2006 decision was unreported the learned JC was also wrong to say that the said Court of Appeal had decided on "O. 46 r. 2(1)(b) RHC"; the said Court of Appeal did not decide on this; in fact a

judge in the panel said: "you can still sue in the old company and mention the new company's name". Learned counsel then purported to enclose a copy of his rough hand-written notes of proceedings in the Court of Appeal in his submission as proof of his assertion.

(f) In regard to the issue raised on the change of the plaintiff's name, Mr Tai submits that it was not substantial as the change was only the addition of these alphabetical words of "UOB" and the name changed still have "Kay Hian Pte Ltd" in it as "UOB Kay Hian Pte Ltd". He contends that the aforesaid minor change of name does not change the corporate identity of the plaintiff, reliance being placed the Court of Appeal's decision in *Fawziah Holdings Sdn Bhd v. Metramac Corporation Sdn Bhd & Another Appeal* [2006] 1 CLJ 996; [2006] 2 AMR 1 in which Gopal Sri Ram JCA (as he then was) held, *inter alia*, that the change in the shareholders of the defendant therein does not change its corporate identity and the defendant may have changed its name and may have different shareholders but it is still the same person.

(g) Based on the authority of *Fawziah Holdings*, the learned JC erred in law and/or misdirected himself on the change of name as the bankruptcy proceedings were filed and proceeded in the plaintiff's name as "Kay Hian Pte Ltd", which is the same plaintiff's name in Court of Appeal Civil Appeal No. Q-02-425-2001 and the same name as Suit No. MR83 of 1987.

(h) It was further submitted that O. 46 r. 3(2) RHC, which was expressly legislated for O. 46 r. 2(1)(b) provides for leave to be applied only where the alleged change occurred "SINCE" the date of the judgment or order ie, AFTER the order of the 8 August 2003. Therefore, as the change of name was made in 2001 BEFORE the order of the 8 August 2003 was made by the Court of Appeal, O. 46 r. 2(1)(b) does not apply and has no relevance to the appeal herein as expressly stated in O. 46 r. 3(2)(c).

[56] Mr Tai however did not address us specifically on the issue relating to the plaintiff's unilateral conversion of the judgment sum.

[57] Learned counsel for the defendant, Mr Antonio Sim, on the other hand, in his written submission and reply submission and oral argument before us, submits that both the SAR and learned JC did not err in law or fact when they struck out the bankruptcy notice for the reasons stated in their judgments.

[58] With regard to the first ground on the change of name, learned counsel submits that the learned JC was correct in striking out the bankruptcy notice under O. 46 r. 2(1)(b) which reads as follows:

> **O. 46 r. (2). When leave to issue any writ of execution is necessary.**
>
> (1) A writ of execution to enforce a judgment or order may not issue without the leave of the Court in the following cases, that is to say:
>
> (a) … ;
>
> (b) where any change has taken place, whether by death or otherwise, in the parties entitled or liable to execution under the judgment or order;
>
> (c) …

[59] It was submitted that it is clear that the plaintiff's name in the judgment order dated 8 August 2003 was Kay Hian Pte Ltd and its address was at No. 1, Bonham Street-20-01-UOB Building, Singapore 0104.

[60] However, a search at the companies registry in Singapore revealed the plaintiff's name has been changed since 2 January 2001 to UOB Kay Hian Pte Ltd and the new address is at 80 Raffles Place 30-01 UOB Plaza 1 Singapore 048624.

[61] Hence, with effect from 2 January 2001, both the plaintiff's name and address given in the judgment order dated 8 August 2003 are no longer in existence.

[62] Under the bankruptcy notice issued against the defendant, "Kay Hian Pte Ltd (now known as UOB KAY HIAN PTE LTD)" was cited as the judgment creditor and the address of the judgment creditor is stated as 80 Raffles Place #30-01 UOB I Plaza 1, Singapore.

[63] It was submitted that under O. 46 r. 2(1)(b) RHC as set out above, it is incumbent on the plaintiff to apply for leave of court to use its new name before issuing the execution. No such application was ever made by the plaintiff in this case.

[64] The same passage of the judgment of Richard Malanjum J (now CJSS) in *Re Liew Kong Ken* was cited as authority for this proposition.

[65] Applying the decision in *Re Liew Kong Ken* to this case, since the changes made in the name and address of the plaintiff as judgment creditor in the bankruptcy notice were made without leave of court pursuant to O. 46 r. 2(1)(b), the bankruptcy notice is not in accordance with the terms of the judgment order dated 8 August 2003 and is invalid and *void ab initio* and a nullity.

[66] With regard to the issue on unilateral conversion of the judgment sum, learned counsel for the defendant submits as follows.

[67] It is clear that the amount claimed in the statement of claim under Writ No. 83 of 1987 was in Singapore Dollar of S$21,993.41 as at 1 October 1985 and the plaintiff did not indicate its equivalent in Malaysian Ringgit based on any rate of exchange.

[68] In the bankruptcy notice the plaintiff is now claiming for RM227,606.18 based on the exchange rate fixed by Bank Negara for commercial banks as at 17 October 2008, ie, the date of filing of the bankruptcy notice as per buying rate at RM1.00: S$0.4173 (Singapore Dollars).

[69] The sum of S$94,980.06 or RM227,606.18 was a sum unilaterally assessed by the plaintiff without the consent of the defendant. Such unilateral conversion is against the decision of this court dated 27 August 2008 which is binding on the plaintiff.

[70] As the matter is *res judicata*, the plaintiff is estopped from repeating what it did in application for execution No. 36-1-2005 (MR) which had already been adjudicated by the High Court and the Court of Appeal see: *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 at p. 190 (ruling No. 1).

[71] It was further submitted that the formula adopted by the plaintiff in converting the judgment sum of S$21,993.41 into Malaysian Ringgit is also against the principle laid down in a

number of decided cases: see *Wong Li Fatt William (an infant) v. Haidawati bte Bolhen & Anor* [1994] 1 LNS 196; [1994] 2 MLJ 497 at pp. 498-499, *Re Kang Chong Yeow, ex p Mivan Far East Sdn Bhd* [2001] 8 CLJ 226; [2001] 3 MLJ 98 and *See Hua Daily News Bhd v. Tan Thien Chin & Ors* [1985] 1 LNS 131; [1986] 2 MLJ 107 SC, on the correct mode or manner of converting a foreign currency judgment into Malaysian Ringgit.

[72] In *Wong Li Fatt William (an infant)*, Richard Malanjum J (now CJSS) held *inter alia* as follows:

> (6) As for special damages, *inter alia*, RM2,100 was allowed for a wheelchair and reclining chairs; RM300.00 for transport charges to the hospital; RM520 for air fares to seek treatment in Singapore; S$7,764.10 for medical expenses incurred in Singapore; and RM20 for damaged clothing and shoes.
>
> (7) Although the medical expenses in Singapore were incurred in February 1988, the sum was not due and payable prior to judgment. Therefore, the exchange rate should be taken at the date of judgment and not at the time of loss.

[73] In *Re Kang Chong Yeow*, Abdul Wahab J (as he then was) held at p. 99 (MLJ) as follows:

> (4) The bankruptcy notice stated not only the original sum due in US dollars but also stated clearly the conversion rate applied, being RM3.62 = US$1, substantially below the official rate of conversion RM3.8 O = US$1 of which public notice may be taken. The exchange rate should be the rate on the date of judgment. If a debtor refuses to pay and an adverse exchange rate occurs during the delay, the debtor should not benefit from it.

[74] In *See Hua Daily News Bhd*, the facts were that the respondents (the plaintiffs) obtained judgment against the appellant (the defendant) at the Brunei Court for the sum of B$109,192.12. Thereafter the respondents filed an action at the High Court at Miri, Sarawak to enforce the said foreign judgment in Malaysia against the appellant. The respondent thereafter filed an application for summary judgment under O. 14 RHC and on 10 December 1984 the High Court allowed the said summary judgment and final judgment was entered against the appellant for B$109,192.12. The appellant appealed to the Supreme Court against the decision of the High Court and the Supreme Court had dismissed the said appeal.

[75] On the formula of conversion of a judgment sum awarded in a foreign currency, Mohamed Azmi SCJ (delivering the judgment of the court) held, at p. 112 (MLJ), as follows:

> In the instant appeal, the amount claimed by the respondents represents the damages assessed in Brunei currency by the High Court at Bandar Sri Begawan, arising out of a libel suffered by them. But since the respondents have decided to enforce the judgment by filing a claim in Miri, in accordance with the practice of the court we are of the opinion that the judgment should be decreed in Malaysian currency. We would therefore vary the order by entering judgment for the respondents for such sum in Malaysian Ringgit equivalent to Brunei $109,192.12 cts, on the basis of Bank Negara rate of exchange prevailing at the date of the Order 14 Malaysian Judgment *viz* December 10, 1984.

[76] It was submitted, based on the decision of the two High Courts and the apex Supreme Court above, the exchange rate to be used for the conversion of the judgment sum of S$21,993.41 into Malaysian Ringgit should be the date of the judgment order dated 8 August 2003.

[77] In this case the plaintiff did not calculate the exchange rate based on Bank Negara exchange rate as at the date of judgment ie, 8 August 2003 but on Bank Negara exchange rate as at 17 October 2008 ie, the date of the filing of the bankruptcy notice, which based on the authorities cited earlier is clearly wrong and must be set aside.

[78] Based on the foregoing reasons, the learned SAR and JC were perfectly correct in holding that as the bankruptcy notice was not in accordance with the terms of the judgment order dated 8 August 2003, it was a nullity and liable to be set aside based on the two aforementioned grounds.

[79] With regard to the allegation made by learned counsel for the plaintiff based on some rough written notes of proceedings made personally by learned counsel himself during the hearing of Civil Appeal No. Q-03-1-2006 that one of the panel members had said: "you can still sue in the old company and mention the new company's name", learned counsel for the defendant submits that this argument has no basis in law and must be totally rejected by this court. It is clear from the full written decision of this court in Civil Appeal No. 0-03-1-2006 (see pp . 111 to 117 of the ROA)

that the court never made such a statement to support such allegation of the plaintiff's counsel in his rough written notes of proceedings.

[80] As regards to learned plaintiff's counsel's submission that O. 46 r. 2(1)(b) only applies to a change of name of the judgment creditor after the date of judgment, again it was submitted that this submission has no merit. This is because it is not disputed that:

(a) the change of name of Kay Hian Pte Ltd to UOB Kay Hian Ltd took place on 2 January 2001 (see pp. 35-69 ROA);

(b) the Court of Appeal order in Civil Appeal Q-1-2006 was given on 8 August 2003; and

(c) since the date of the Court of Appeal order on 8 August 2003 the name of Kay Hian Pte Ltd had already ceased to exist.

[81] By virtue of the above it is only lawful for the plaintiff to proceed with the said bankruptcy proceedings by using its current name and not by using a name which has already ceased to exist.

[82] With regard to the case of *Fawziah Holdings Sdn Bhd*, it was submitted that the said case is distinguishable based on the facts as there was no change of name of the company but only a change of shareholders of the company and it is also not a case of a bankruptcy proceeding being issued not in accordance with the terms of the judgment or order of the court.

Our Finding

[83] Having perused the record of appeal, having had the benefit of reading the written submissions and heard the oral arguments of learned counsel for both parties as set out above, having carefully perused the decision of the Court of Appeal in Civil Appeal No. Q-03-1-2006 dated 28 July 2008, we are of the view and entirely in agreement with learned counsel for the defendant that this appeal has no merits and ought to be dismissed. We say so based on the following grounds.

[84] We agree with learned counsel for the defendant that the issues raised in the two grounds in encl. (6) relating to the requirement for leave under O. 46 r. 2(1)(b) upon the plaintiff's change of name since 2001 and the unilateral conversion of

currency of the judgment sum raised in the present appeal had already been dealt with and upheld by the Court of Appeal in its previous decision in Civil Appeal No. Q-03-1-2006 dated 28 July 2008.

[85] As rightly pointed out by learned counsel for the defendant, even though the decision in Civil Appeal No. Q-03-1-2006 dated 28 July 2008 was related to the application for Execution No. 36-1-2005 (MR), the principles established therein are equally applicable to a bankruptcy proceeding as illustrated in the foregoing passages of the judgments in *Re Liew Kong Ken* and *Re Hj Ahmad Lazim & Ors* cited above.

[86] We are of the view that the learned JC was perfectly correct when in his judgment dated 16 June 2011 in dealing with the two grounds for striking out he had considered himself bound by the decision of the Court of Appeal in the Civil Appeal No. Q-03-1-2006 dated 28 July 2006 on the principle of *stare decisis*. Consequently, the question of the learned JC having erred in law or in fact as alleged by the plaintiff does not arise for consideration.

[87] We are of the further view that the decision of the Court of Appeal in Civil Appeal No. Q-03-1-2006 on the two issues raised in the first two grounds in encl. (6) for striking out the bankruptcy notice accords with the established principles laid down in the various cases cited by learned counsel in his written submission and as discussed above and we see no cogent reason to depart from the said judgment of this court.

[88] It is our view that the plaintiff's persistent and dogged attempt to ignore the Court of Appeal's decision in Civil Appeal No. Q-03-1-2006 dated 28 July 2008 and insisted on issuing execution proceedings and/or bankruptcy proceedings based on the same terms and details which had been ruled against the plaintiff would tantamount to an abuse of the court process.

[89] With regard to the issue raised by learned counsel for the plaintiff that the SAR and the learned JC erred in law and in fact when they went behind the judgment regularly obtained by the plaintiff *vide* the judgment order dated 8 August 2003 and in which there was no allegation of fraud or collusion or miscarriage of justice by the defendant and where the judgment sum proper was not challenged, to strike out bankruptcy notice, we are of the

view that this contention was based on a misconception regarding the true nature and purport of the defendant's application in encl. (6). We say so for the following reasons.

[90] It would appear from the case law authorities cited by learned counsel for the defendant in his written submission in regard to encl. (6) (see: *Datuk Lim Kheng Kim v. Malayan Banking Bhd* [1993] 3 CLJ 324; [1993] 2 MLJ 298 and *Re: Ling Ten Yew; ex parte: Bersama Diri Edar Sdn Bhd* [2002] 1 LNS 134; [2002] 6 MLJ 204 and *Re Cheah Wee Liam, Ex p Robert Teng Lye Hock* [1999] 4 CLJ 305; [1999] 6 MLJ 615) that there are really two methods by which a judgment debtor can challenge a bankruptcy notice issued against him, namely:

(a) by way of affidavit pursuant to r. 95 of the Bankruptcy Rules 1969 if the grounds for setting aside involve the issue on counterclaim, set off or cross demand against the creditor which equals or exceed the sum in the bankruptcy notice and that such counterclaim, set, off, or cross demand cou1d not be set up in the action in which the judgment was obtained. and

(b) by way of summons in chambers supported by an affidavit pursuant to r. 18 of the Bankruptcy Rules 1969 if the judgment debtor raised other issues apart from the aforesaid issue on counterclaim, set off or cross demand.

[91] This was clearly spelt out in *Ling Ten Yew*, in which it was held as follows:

> (1) A bankruptcy notice which must be founded on a final judgment or order against the judgment debtor, may be set aside by way of filing an affidavit in Form 7 of the Rules pursuant to r. 95(1) or by filing a summons in chambers supported by affidavit pursuant to r. 18. Any ground that does not fall within the sphere of s. 3(1)(i) of the Bankruptcy Act 1967 read together with rr. 94 and 95, must fall within the ambit of r. 18's application; *Datuk Lim Kheng Khim v. Malayan Banking Bhd* [1993] 12 MLJ 298 followed.

[92] In *Datuk Lim Kheng Kim* the court had earlier held that:

> (2) Failure on the part of the appellant to follow r. 18 of the Rules rendered his affidavit in opposition (encl. 15) ineffective and bad in law because unless the court otherwise directs challenges to the creditor's petition or bankruptcy

A notice other than that he has a counterclaim, set-off or cross demand which equals or exceeds the judgment must be made by filing a notice of motion supported by an affidavit …

B **[93]** It is apparent from its intitulement that encl. (6) was made pursuant to r. 18 of the Bankruptcy Rules 1969 ie, the defendant is not challenging the correctness of the sum claimed in the bankruptcy notice on account that he has a counterclaim, set off or cross demand. What was challenged was the capacity of the party named therein as judgment creditor to issue the bankruptcy C notice in view of O. 46 r. 2(1)(b) RHC and the mode of conversion of the judgment sum of S$21,993.41 and the interest accrued thereon into its equivalent in Malaysian Ringgit which is contrary to the judgment of this court in Civil Appeal dated 28 July 2006 and principle of law laid down in various decided D cases discussed above, which the defendant claims rendered the bankruptcy notice bad in law and liable to be set aside. In our opinion, these issues certainly fall within the "other issues" ground under the second method of impugning a bankruptcy notice under r. 18 of the Bankruptcy Rules 1969. Hence, the question of the E defendant going behind the judgment order dated 8 August 2003 to attack the judgment sum awarded is without merit. We therefore dismiss this argument of the plaintiff.

[94] We are of the view that the defendant's challenge of the F sum in the bankruptcy notice is in line with the decision in *Ghazali Mat Noor v. Southern Bank Bhd & Other Cases* [1989] 2 CLJ 380; [1989] 1 CLJ (Rep) 35; [1989] 2 MLJ 142 in which it was held at as follows:

G (1) For a bankruptcy notice to be valid it should state the exact amount due at the date of the bankruptcy notice. The judgment debtor must know the exact amount he has to pay to avoid bankruptcy. He does not have to make calculations or enquiries.

H (2) In the present appeals, as the interest sums payable have not been quantified, the bankruptcy notice in all five cases are invalid, *ab initio* and consequently all subsequent proceedings to these bankruptcy notices are a nullity.

I

[95] Similarly in our present case, the defendant must know the exact amount due at the date of the bankruptcy notice and the defendant does not have to make calculation or enquiries on what is the actual exchange rate from Singapore Dollars to Malaysian Ringgit as at the date of judgment as this duty is in the hands of the plaintiff. In this case the plaintiff had failed to quantify the exact amount owing in the bankruptcy notice as the wrong exchange rate was applied which rendered the bankruptcy notice invalid and void *ab initio* and ought to be set aside as being a nullity.

Conclusion And Decision

[96] Based on our foregoing findings and conclusion, we find no merits in this appeal. We therefore affirm the decision of the learned Judicial Commissioner dated 16 June 2011 and dismiss this appeal with fixed costs of RM10,000 to the defendant. The deposit is to be refunded to the plaintiff.